

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Waiver of Digital Testing Pursuant)	MB Docket No. 05-317
to the Satellite Home Viewer Extension)	
and Reauthorization Act of 2004)	

**REPLY OF WSIL-TV, INC. TO THE
OPPOSITION OF ECHOSTAR SATELLITE L.L.C.**

WSIL-TV, Inc., permittee of WSIL-DT, Harrisburg, Illinois, (“WSIL”) hereby replies to the Opposition of EchoStar Satellite L.L.C. (“EchoStar”) filed on December 30, 2005, in the above-referenced proceeding.¹

On November 29, 2005, pursuant to Section 339(a)(2)(D)(vii) of the Communications Act, WSIL requested a digital testing waiver for WSIL-DT based on the station’s use of a side-mounted antenna. Significantly, WSIL demonstrated that it met the statutory criteria for a digital testing waiver. Because WSIL has met the criteria, the burden has shifted to satellite providers to provide an overarching public interest justification for denying the requested waiver. EchoStar has opposed WSIL’s waiver request on the grounds that the waiver request (1) is premised upon impermissible financial exigency and (2) fails to demonstrate that the station’s current operation represents a substantial decrease in the station’s digital signal coverage area. EchoStar is plainly wrong on both points and has not met its burden of justifying a denial of the waiver request that meets the statutory

¹ On December 30, 2005, DIRECTV, Inc. filed comments in this proceeding. Because DIRECTV’s comments were not directed specifically to the WSIL waiver request, the instant reply does not address DIRECTV’s comments. WSIL understands that the Commission will consider carefully WSIL’s waiver request in this proceeding as it does all waiver requests.

criteria.²

First, SHVERA sets forth six specific statutory bases on which waiver requests may be granted, including where “the station experiences a substantial decrease in its digital signal coverage area due to the necessity of using a side-mounted antenna.” 47 U.S.C. § 339(a)(2)(D)(viii)(IV). WSIL’s waiver request presents such a case. Contrary to EchoStar’s cut-and-paste litany,³ WSIL’s waiver request is not founded upon impermissible “financial exigency.” As indicated in WSIL’s waiver request, the use of a side-mounted digital antenna is in the public interest: the premature use of a top-mounted digital antenna by WSIL would require the station’s top-mounted analog antenna to be moved to a side-mounted position, which would result in a substantial loss of existing analog service to nearly 60,000 viewers.

Moreover, contrary to EchoStar’s assertion that “[a]t the very least WSIL-DT should have explored alternative means of providing full digital service (*e.g.* using a separate tower or different orientation) and presented evidence of its efforts in this regard,”⁴ neither the statute nor the Commission’s Public Notice require any such showing—either explicitly or implicitly. To read such a requirement into the testing waiver provisions of SHVERA would elevate the “clear and convincing” evidence standard set forth in SHVERA into a “beyond a reasonable doubt” standard, because it would require WSIL to explain away every other possible digital facility transmission permutation that the station—or, apparently, EchoStar—could have conceived. Of course, WSIL

² Because DIRECTV has not specifically addressed WSIL’s waiver request, DIRECTV has not met its burden either.

³ EchoStar’s opposition to WSIL’s filing references Station WPBF-DT, *see* EchoStar Opposition at 46, which has no relationship to WSIL.

⁴ EchoStar Opposition at 45.

did not make its transmission facility decisions based upon whether it would qualify for a waiver of the digital testing provisions. That decision was made long before SHVERA and its digital white area testing waiver provisions were enacted. Indeed, WSIL made its transmission facility decisions based on factors such as replication/maximization patterns, service to the public, and existing practical constraints such as the tower site and location of WSIL's analog antenna. In making its arguments about the clear and convincing standard, EchoStar is attempting to rewrite the clear language of the statute. There is no basis in the statute for EchoStar's assertion that the "clear and convincing" standard means that WSIL must now justify its decision to employ a side-mounted antenna by explaining its rejection of other, theoretical transmission facilities. Nor does the "clear and convincing" evidence standard, as EchoStar asserts, "demonstrate[] an intent to limit viewers to those broadcasters who could not provide full digital service because of circumstances that are beyond their control."⁵ Rather, SHVERA's requirement that the evidence be "clear and convincing" demonstrates only that there is no presumptive right to obtain a waiver and that the Commission should consider carefully all such requests. WSIL's waiver request meets the clear and convincing evidence standard.

Second, SHVERA requires, in relevant part, that, to qualify for a digital testing waiver, a station's use of a side-mounted antenna result in a "substantial decrease" in signal coverage area. WSIL's waiver request demonstrates—and EchoStar's own analysis confirms—that the decrease in population coverage as a result of WSIL's necessary use of a side-mounted antenna meets the threshold of "substantial."

_____As set forth in WSIL's waiver request, it is physically impossible for WSIL-DT to construct

⁵ EchoStar Opposition at 3 (internal quotations omitted).

its DTV top-mount maximization facility at its allotted height because the station's NTSC antenna is located at the top of the tower. The unavailability of the tower top is not a "financial exigency," as EchoStar disingenuously characterizes it, but it is an unremediable circumstance—absent a substantial loss of service to nearly 60,000 existing NTSC viewers—necessitating the use of a side-mounted antenna for WSIL-DT. By EchoStar's own analysis, the difference between WSIL-DT's current coverage area and WSIL-DT's maximization coverage area from its top-mount facility is 38,913 people.⁶ EchoStar's characterization that 38,913 people represents a "small difference"⁷ that is not substantial is meritless.

Conclusion

For the reasons set forth above and in WSIL's waiver request, the digital testing waiver for WSIL-DT should be granted, and EchoStar's Opposition should be denied.

⁶ See EchoStar Opposition, Hammett & Edison Report at 3. WSIL's waiver request calculated the population difference to be nearly 31,000 people.

⁷ EchoStar Opposition at 45.

Respectfully submitted,

WSIL-TV, INC.

/s/

David Kushner
Coe Ramsey
Stephen Hartzell

BROOKS, PIERCE, MCLENDON,
HUMPHREY & LEONARD, L.L.P.
Wachovia Capitol Center, Suite 1600
150 Fayetteville Street (27601)
Post Office Box 1800
Raleigh, North Carolina 27602
Telephone: (919) 839-0300
Facsimile: (919) 839-0304

Its Attorneys

January 17, 2006

Certificate of Service

The undersigned, of the law firm of Brooks, Pierce, McLendon, Humphrey & Leonard, L.L.P., hereby certifies that s/he has caused a copy of the foregoing **Reply of WSIL-TV, Inc. to the Opposition of EchoStar Satellite L.L.C.** to be placed in the U.S. Mail, first-class postage prepaid, addressed as follows:

David K. Moskowitz
EchoStar Satellite L.L.C.
9601 South Meridian Boulevard
Englewood, CO 80112

William M. Wiltshire
Michael Nilsson
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, NW
Washington, DC 20036

Susan Eid
Stacy R. Fuller
DIRECTV, Inc.
444 North Capitol Street, NW
Suite 728
Washington, DC 20001

This the 17th day of January, 2006.

/s/
Sandra S. Kreps